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ABSTRACT

This speech outlines factors that have caused courts to take more active roles in resolving educational problems. Among these factors are the increase in the importance of education, an increasing proclivity to resort to courts, efficient mass communication media, and an inability of legislative bodies to provide all of the solutions to problems of the times. Consequently, the courts have been creating new law, rather than simply redressing alleged wrongs. Accompanying this trend are such new plaintiff tactics as (1) press conferences designed to focus attention on the plaintiff's theory of the case, (2) political pressures on school board members to settle out of court, (3) demands for general and punitive damages, (4) expansion of the class action concept, (5) vigorous and uncompromising legal advocacy by legal groups litigating "law reform" issues, and (6) more extensive representation of public school employee organization members. (JF)

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THE NEW TACTICS USED BY PLAINTIFFS IN IMPOSING THEIR VIEWS ON, OR ENFORCING THEIR RIGHTS AGAINST, PUBLIC SCHOOL BOARDS

- a talk by -

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The fundamental purpose of civil litigation always has been to prevent or redress civil wrongs. In the United States, the law always has contemplated that when a person believes he has been wronged, or is about to be wronged, he may go into Court and attempt to forestall the threatened wrong or seek relief from the wrong actually visited upon him by another. Regardless of whether the defendant in civil litigation was a person or a governmental or business entity, the Courts always have been willing to consider the plaintiff's claims and, where meritorious and not subject to some exemption by a rule of law, they have enjoined the future wrong or redressed the past wrong.

Thus, public schools in America have never been exempt from having to defend against lawsuits, although, in some cases, relevant rules of law which restricted tort liability, protected the school board's legislative discretionary authority against encroachment by the judiciary, placed severe limitations on school boards in the delegation of school board legislative powers to school employees, or gave judicial sanction to a "hands-off" attitude fostered by the principle of in loco parentis did intervene to limit the sanctions actually imposed against the public schools by the Courts. While the limited relief granted some plaintiffs in civil suits brought against the public schools in years past undoubtedly did have a deterrent effect on litigation involving the schools, enough litigation was directed against the public schools over the decades to make them no strangers in the courtrooms of America. But, beginning in 1954 with the landmark school racial desegregation case of Brown v. Board of Education, a profound change in the Courts' attitude toward public education in the United States began. And this change

in attitude is still evolving in a manner so pervasive that virtually every facet of public education is significantly affected.

This change in judicial attitude towards public education in the United States was conditioned by five basic factors:

1. Increase in importance of education. As our society becomes more complex, the educational requirements for productive participation in the economic system undergirding our way of life increase. As automation eliminates "grunt" labor, men must learn skills far more sophisticated than ever imagined only a few decades ago just to stay in the labor market as producers and maintain their human dignity in our work-oriented society. Moreover, in our democratic system, it is absolutely imperative that all men receive their entitlement to equal educational opportunity and the insidious and artificial bars relating to race or ethnic origin must fall or our society itself will be in danger of falling. The Courts clearly recognize this precept and the logic of the precept is interwoven throughout the case law dealing with constitutional questions posed in the public education context.

2. Increase in subject matter which the Courts will take cognizance. Not only is there today an increasing number of school issues which the Courts find as having a constitutional dimension but also the Congress and the state legislatures have considerably broadened the general civil rights laws under which persons are entitled to seek specific kinds of judicial relief in uses involving allegations of discrimination based on race, ethnic origin, religion, sex and age. The principle of in loco parentis, except as it relates to tort liability in cases involving school supervision over the health, safety and general physical well-being of students, has been expressly limited by the Courts in the past several years. This is especially true in the First Amendment "free speech" area. While the school administrators and teachers of yesterday broadly prohibited on public school grounds during school hours

such activities of students as demonstrating, sign-carrying, pamphleteering, speech-making and distributing so-called "underground newspapers" and vigorously enforced dress and grooming codes, public school officials of today must operate in these areas under specific constraints imposed by the Courts. Today, restraints in the exercise of First Amendment "free speech" rights by public school students must be limited in scope as to time, place and manner, and they are valid only if school officials can affirmatively prove that the repressive regulations are necessary to avoid "substantial" and "material" disruption of, or interference with, classwork or with the requirements of discipline appropriate to the operation of the schools. Moreover, the granting of the right to vote to the 18-year old will augur for further extension of rights of high school students in the public schools. New rights will, in some cases, be created by the Courts in the years ahead but, in all cases, will be protected by the Courts in their traditional role as guardians of the Constitution.

3. Increasing proclivity to resort to the Courts. The fact is that people in our nation are becoming more litigious. When they do not receive the response they desire from public school officials, in a matter they perceive involves their "rights," they recognize no subtle social pressures to dissuade them from asserting such rights in the Courts. In large measure, this upsurge of boldness in attitude about suing the public schools is a product of our increasingly impersonal society. The Courts recognize the societal trend toward impersonalization as being a real threat to the status of the individual citizen in our nation and, in case after case, have ruled in favor of the individual citizen in suits involving bureaucratic business and governmental entities, including the public schools, by greatly expanding the constitutional law concepts of substantive and procedural "due process."

4. Efficient mass communication media. The interchange of ideas throughout our nation today is conducted at a staggeringly fast pace because of the efficiency of our mass communication media. All of us have been in the position, at one time or another, of being asked to explain a significant new decision handed down by an appellate court just a few hours earlier in a different city. The substance of the decision, as seen through the eyes of a journalist, is transmitted by mass media almost instantaneously, while the complete text of the decision may not be available for lawyer-like study for more than a week. This is also true of the filing of new lawsuits. This fast cross-fertilization of ideas, in tandem with an increasing sophistication among the people on the powers of the judiciary, tends to stimulate new, imaginative legal theories on which to base court challenges of public school regulations.

5. Inability of legislative bodies to provide all of the solutions to the problems of the times. State and local legislative bodies, and the United States Congress, generally are beholden to the majority view. Not so with the judiciary. As retired Chief Justice Earl Warren said on his 80th birthday on March 19, 1971:

> When I was in political life I realized that politics is the art of the possible, as someone has said. You have an idea but you compromise as you go along in order to make progress . . . and you hope that the time may come when your ideal will be achieved.
>
> But when you are dealing with the judicial process and with constitutional principles, you can't say you will be satisfied with establishing a little of the principle today and maybe some time (those who benefit) will get all of it. You stand or fall on the principles you feel govern the situation.
>
> If a decision fails to conform to the wishes of the public, that is just one of the hazards you assume when you enter the realm of the judicial process.*

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* San Diego, California, Evening Tribune, Friday, March 19, 1971.

Citizens who do not believe that they can successfully press their case with the legislative branch often couch their cause in the language of a lawsuit and turn to the Courts for relief. Sometimes this decision to eschew the legislative approach stems from the conviction that the legislature is not prepared to approve the substance of a particular proposal or the attitude that the relatively unstructured, free-for-all type proceedings which are legislative hearings simply are not the best medium in which to sharpen relevant issues and clarify guiding principles. The Courts are aware of the plight of the "unpopular idea" in the legislative halls and the infirmities of the legislative hearing system.

These five general factors have combined in recent years to change the attitude of the Courts toward local public education. This change in judicial attitude has caused a correlative change in the approach of citizens who would resort to the judicial processes to solve disputes with the public schools. Part of this change in approach has caused the fundamental emphasis of filing civil suits against the public schools to switch from seeking relief or redress of an alleged wrong to establishing and creating new law. In short, a significant number of lawsuits filed in the United States against the public schools today primarily seek to make new law. These lawsuits are designed to put the judiciary in the position of creating new legal rights affecting public education which state and local legislative bodies will have no choice but to honor. And with this new design have come new tactics which plaintiffs use in imposing their views on, or enforcing their rights against, public school boards.

Let us look at some of these new tactics:

1. Press conferences held by plaintiffs outside the presence of their legal counsel prior to and during the lawsuit in order to dramatize their claims and focus public attention upon the plaintiff's theory of the case in the hopes of winning a public relations "verdict" in their favor. The public relations value of the "press conference" is not lost upon those who seek to establish new law through the judicial process. The mass communication media, in their competitive efforts to inform and entertain the public, are most willing to give news coverage to those who would institute lawsuits challenging old ways, especially if the plaintiffs represent important segments of society or if their claim could have a significant impact upon the public school system.

While, presumably, the press conference has no impact upon the immediate decision of the Court on the merits of the lawsuit, it does focus public attention upon the plaintiff's cause. This often generates extensive public consideration of the issues and rallies support for the plaintiff. It also may open up other options for the plaintiff to win his point, if not his lawsuit, by engendering support from legislators who agree with the plaintiff's point of view and, because carefully managed publicity about the lawsuit has created a broader base of political support, are willing to translate this support into a tangible legislative bill proposal. Moreover, the free publicity may enhance the political aspirations of the plaintiff or bring him money contributions to help finance his lawsuit.

In the sense that the press conference generates political dialogue on the issues of the lawsuit, it could ultimately affect the outcome of the lawsuit itself by helping to create a climate for a favorable appellate court decision a year or so hence.

Usually, the press conference is staged without the direct participation

by legal counsel of plaintiff; on occasion, however, it is legal counsel who assumes unto himself the job of public information officer of the plaintiff's cause and either conducts the press conference himself or structures it ahead of time.

The problem faced by the defendant public schools is twofold: (a) Should the plaintiff's press conference be answered in kind? and (b) If so, how? This is not the criminal case situation where the right to a fair trial by jury may be jeopardized by public discussion of the issues out of court. Instead, the subject matter of the lawsuit invariably is of profound political importance because it affects the governance and operation of local public education. The people are entitled to some kind of report from their trustees of local public education to attacks upon the public schools. The exact nature of the response of the public schools is a "counter-tactic" and depends upon all the circumstances of each individual case.

2. Bringing immense political pressures to bear against the school board or individual members thereof in the hopes of causing the school board to settle a lawsuit without full judicial consideration of the merits of the case. The school board wears two hats in any lawsuit: (a) it is a defendant in the lawsuit, and (b) it is a political governing body of a governmental entity. Therefore, school board members (and the school administrators and teachers over whom the school board exercises authority) are caught between two sets of groundrules -- those applying to a defendant, which hold that nothing be said or done even remotely affecting the lawsuit without prior approval of legal counsel, and those applying to a political leader, which emphasizes the importance of consensus in our diverse society and the necessity for maintaining a broad base of support from the people in order to remain in the position of political leadership.

The filing of a lawsuit against the public schools often signals the start of a political campaign to induce the school board to capitulate in the lawsuit or to decide not to appeal from a trial court decision favorable to the plaintiff, even where there is considerable doubt about whether the trial court made a correct judgment of the law. The persuasive efforts of vigorous and active citizen groups, employee organizations, and even student associations aimed at political leaders should never be underestimated. Sometimes the result is that a political solution reached out of court eliminates the need for the judicial solution, even though the judicial merits of the case ultimately would have seen the position of the public schools prevail.

3. Seeking a court award of "general damages" against the public schools on the grounds that the educational program has operated to injure the plaintiffs. A lawsuit filed in the hopes of creating new law may take two basic forms: (a) a legal action aimed at obtaining a court order establishing new law, or (b) a legal action seeking the creation of new law and demanding damages for the harm which allegedly was suffered by the plaintiffs as a result of the manner in which the old practices or the schools affected him.

Prior to the recent changes in the law governing tort liability of the public schools and before the enactment or application of statutory provisions authorizing the award of damages to persons injured by violations of certain federal laws, most lawsuits designed to test old law and create new law involved no claims for damages. Then, the lawsuit could be litigated more on general legal principles; the school's current budget was not put in peril of insolvency and the lengthy proceedings to establish compensible damages were avoided. Now, however, a new tactic is to combine the assertion of a right with a claim for damages emanating from past refusals on the part of the defendant public schools to recognize the right.

The new tactic essentially puts a "price tag" on the lawsuit. From the plaintiff's standpoint, it gives him more to bargain with in any out-of-court settlement negotiations and is a "carrot at the end of a stick" which encourages him to persist as plaintiff in the lawsuit, especially where he is more of a nominal plaintiff and his lawsuit is really being directed by an association. From the defendant school's vantage point, a claim for damages tends to stiffen resistance and often introduces the school's insurance company's lawyers to what is essentially a dispute over public policy governing education. The insurance company's lawyers add a new dimension to the dispute because they are primarily (and properly) concerned mainly with the school's liability for money damages. Great care must be taken by school people, on the one hand, to prevent an ill-advised damages settlement which sacrifices an educational principle or which will cause an increase in future operating costs by virtue of being forced by the settlement to adopt in the future a new educational program of doubtful validity, and on the other hand, to interfere with or prevent a reasonable money damages settlement so that the schools effectively have repudiated the insurance company as a matter of law and are left holding the bag for any and all "general damages" ultimately assessed against the schools.

4. Seeking a Court award of punitive damages against school board members, school administrators and school teachers for their alleged misuse of authority over the educational program or the pupils of the public schools. Generally, "punitive damages" are imposed by a court against a defendant whose act or failure to act was particularly outrageous, offensive, and wrong. They are in the nature of a "civil fine" which the court may impose upon a defendant to "teach him a lesson." Usually, state law will not permit a public school district to reimburse or indemnify a school board member or school employee for punitive damages assessed against him. Moreover, insurance policies generally do not cover "punitive damages."

Accordingly, when a lawsuit is filed seeking to create new law, it often creates great consternation in the minds of school people when it contains a provision seeking "punitive damages" against them for refusing to recognize the validity of the asserted right. The schools attorney is under a professional obligation to the school defendants to explain all the ramifications of a complaint demanding "punitive damages." The fact that such damages are very seldom ever awarded dampens the in terrorem effect somewhat but the demand for "punitive damages," with all of their ramifications of personal liability, does evoke active concern about, and stimulate continuing interest in, the merits of the lawsuit on the part of the individual school people who are named defendants. In short, the prayer for "punitive damages" is a "real attention getter;" to the extent that it is a factor discouraging good people to stand for election to school boards, it is also an unfortunate tactic and should be regulated by the legislatures, even if such regulation requires only affidavits to support an allegation seeking "punitive damages."

5. Expansion of the "class action" concept so that any judicial decision rendered applies without further litigation to all persons situated similarly with the plaintiff. An essential ingredient of the lawsuit seeking to change the law is that any change in the law arising out of the lawsuit should apply not merely to the individual plaintiffs but also to all other persons in his situation. The principal problem with the "class action" proceeding is posed when there also is a demand for "general" or "punitive" damages. Then, the lawsuit becomes a call for others to rally around the plaintiffs and get a "piece of the action." The prospects of being included as a possible recipient of damages tends not only to focus attention away from the merits of the case in the minds of a substantial segment of the public but also reinforces the notion, at least in the minds of the class of plaintiffs, that society has done them wrong and owes them recompense.

6. Compelling school board members, school administrators, and school teachers to attend lengthy court sessions or depositions to explain and defend their decisions and actions relating to the plaintiff's claims. Many lawsuits aimed at changing the law involve complex fact situations which can be resolved only through extensive testimony in court. Additionally, the plaintiffs often require great amonts of testimony from the defendant school people ahead of the trial in order to perfect their theory of the case. This preliminary and in-court testimony ties up the time of school board members and school employees and precludes them from going about their other business. Careful attention by the schools attorney is required to protect school people from harassment; sometimes, protective orders from the court are necessary, even in the case of interrogatories which, if answered as asked by the plaintiffs, could cause the expenditure of thousands upon thousands of school dollars without any usable information forthcoming.

7. Granting attorney's fees to plaintiffs in litigation against the public schools. Litigation is expensive. It is one thing to articulate a legal theory upon which the courts could base a decision establishing new law, and quite another thing to possess the financial substance it could require to obtain a final decision by the courts. As lawyers in the private practice become more conscious of their potential in shaping new law governing public education and more concerned about their social function in society, they have shown themselves willing to take on cases to create new law. This is especially true of the younger members of the Bar. Usually, the plaintiffs are persons of limited means. After an extensive trial in which they emerge victors, they ask for attorneys fees on the grounds that since the public paid for the legal services of the schools attorney in a situation where the schools were shown to be wrong at law, the public should be ready to pay the plaintiff's legal counsel who prevailed. Whatever the merits of the argument that the

public should pay its protagonist's legal fees, this new tactic deserves legislative attention because of the real danger that judicial proclivity to award attorneys' fees could become a virtual "hunting license" and result in an unintended upsurge in "test cases" against the public schools. Since lawsuits against governmental entities often tend to freeze the "status quo" as of the time the lawsuit was filed, "test cases" can hamper the orderly and prompt facilitation of educational program change to meet changed conditions. In that sense, "test cases" sometimes are self-defeating. I believe that the legislatures should specifically regulate the manner in which courts may allow attorneys' fees in lawsuits against the public schools, just as such fees are regulated in many states in the fields of personal injury, probate and workmens compensation, to name but a few.

8. Attempts to induce a court to continue its jurisdiction over a particular matter to ensure that the school board actually complies with the terms of a court order issued against it. A technique perfected to insure compliance by school districts of court-ordered racial desegregation has been broadened to apply to other situations. A three-judge federal court in the Northern District of California last September struck down as unconstitutional a public school regulation governing distribution of newspapers on high school grounds and two California statutes on which the school regulation was based.* The Court, while eschewing any appearance that it was attempting to legislate, continued its jurisdiction in the case and gave the defendant school board 90 days to devise a new "free speech" regulation and submit it for the Court's approval. This tactic, if applied across the spectrum of educational policy matters, could have a grave impact on the control of education by state legislatures and state and local boards of education.

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*Rowe v. Campbell Union High School District, U.S. District Court for the Northern District of California, No. 51060, decision filed September 8, 1970.

9. Inducing other governmental agencies at the national, state and local levels to institute "test cases" against the public schools to establish new law governing education. There is a plethora of governmental agencies which have enforcement responsibilities impinging upon some area of local public education, including a whole spectrum ranging from the educational course offerings in the elementary classroom to the complex business operations of a large school district. These run the gamut from the United States Department of Justice, through the State Attorney General's office to the local Grand Jury. Lately, the State Labor Departments have joined the almost endless line of governmental agencies who have their legal inspection microscopes focused on the schools. The new tactic involves convincing one of these agencies that the public schools are in violation of some provision of law or administrative regulation and watching the agency set into motion enforcement procedures against the schools; or, in the alternative, instituting legal action attacking both the agency and the schools in an effort to make new law. Thus, other governmental agencies attempt (or are forced to attempt) to expand their powers over the relevant areas of local public education.

10. Expanded programs of vigorous and tenacious legal advocacy conducted by legal aid groups financed by public and private funds to champion the rights and privileges of poor and disadvantaged persons. In the middle sixties, the Economic Opportunity Act began pumping millions upon millions of dollars into free legal aid services for the poor and requiring that at least a portion of that money be spent on "law reform" activities. Generally, the term "law reform" means that in addition to handling the usual types of legal problems for the poor and disadvantaged, legal aid societies also should carefully select for special treatment those unusual cases which, if resolved in favor of the legal aid client, could have a significant impact on the lives of the poor. Of the many subjects

for "law reform" lawsuits, public education was, and remains, a prime defendant.* The issues tested in litigation included student discipline, use of federal funds by local public schools, school bus transportation, school tuition, school integration of pupils and state aid to local public schools, to mention but a few of the growing list.

Legal Aid attorneys are excellent lawyers. And they are zealously crusading for a cause. Accordingly, the "gentlemanliness" of the practice of law is an anachronism. Unlike the admonition of Shakespeare in Act I, Scene 2 of "Taming of the Shrew" to:

> . . . do as adversaries do in law, strive
>
> mightily, but eat and drink as friends . . .

these lawyers never cease striving. And they're tough, aggressive, and tenacious. They bombard the governmental attorney with written pleadings, letters, meetings and publicized confrontations. They never cease boring in. Their "law reform" case is the most important thing in the world to them. They spend massive amounts of time in case preparation. Accordingly, the schools attorney must be prepared to deal with an adversary of such zeal. As with other litigation instituted to make new law, any compromise out of court is virtually out of the question in "law reform" cases brought by legal aid societies. Certain realization of this fact at the outset conditions case tactics throughout the course of the judicial proceedings.

See, "The Impact of Legal Aid Programs for the Poor on the Operation of Public School Districts in the United States," an address by Thomas A. Shannon, 15th Annual Convention of the "National Organization on Legal Problems of Education," Cleveland, Ohio (1969). (or an abridged version thereof which was published in THE LEGAL AID BRIEFCASE, Vol. XXVIII, No. 4, February, 1970, National Legal Aid and Defender Association, 1155 East 60th St., Chicago, Illinois 60637).

11. More extensive and active legal counsel and representation of public school employee organization members on issues affecting their employment relationship with the schools. Group legal services on a grand scale is a new dimension for the public schools. Like legal aid for the poor and disadvantaged, the principal value of a group legal services plan for school employees is that it permits judicial resolution of problems relating to the employment rights of school employees without necessitating the school employee-plaintiff to seriously alter his style of life, much less him standard of living.

In California, the California Teachers Association (CTA) (an NEA affiliate) last year established a group legal services program. It assessed each of its almost 200,000 members $2.00 a piece to finance the program for the first year. The CTA retained top-flight lawfirms through the state to represent and counsel CTA members in problems related to their employment relationship with their school board employers and in credential disputes with the State Board of Education. Specifically, the areas of legal services provided by local private lawfirms under a "group legal services" contract include: assignments, credentials, demotion, discipline of pupils, leave, retirement, salary, suspension and workmens compensation.

The new tactics involved here relate to the new significance which individual cases assume. There are many gaps and voids in the law governing the whole range of the employment relationship between a local public school district and its teachers. It is a fertile field for judicial lawmaking. Thus, many cases which were relatively smoothly disposed of out of court in the past can now assume a new significance as levers to pry new law out of the courts. The era of the "minor" case may be gone. And probing for "weakspots" in the law, as seen from the vantage points of the teachers, will be rife.

12. Student organizations obtaining legal counsel and advice independent from the public school system and acting on such advice in their relationships with the public schools. There is a group of highly articulate, aggressive young people enrolled in the high schools today who not only are well informed about their expanding civil rights and are desirous of enjoying such rights, but also are interested in being part of the effort to expand such rights and are sufficiently sophisticated to know where and how to obtain legal counsel. These young people are continually striving to open further the doors of responsible adulthood to persons who just a few years ago were described by courts throughout the nation as "being of tender years."

The new tactic involved here is that the schools attorney and the attorney for a student or group of students are effectively solving problems which, prior to 1969 and the United States Supreme Court's decision in the Tinker case, were exclusively the province of the school official and the student.

13. Better informed, more aggressive citizenry, resulting in a plethora of threats to sue the public schools which must be carefully considered by the schools attorney's office. The threats of lawsuits agains the schools is today a common thing. In many ways, threats are like tinkling brass. But, when a responsible school official contacts the schools attorney to discuss with him such threats, it is clear that the threat has had some kind of an impact. It is difficult to assess the effect of such threats on the governance and administration of the schools in light of today's expanding role of the judiciary in school operations. Initially, I believe that threats have an intimidating impact but, in the longer run, produce a new sophistication among school officials toward the court process. To the extent that threats to sue trigger a reexamination of the public school's disputed policies in light of our new days, a not unhealthy situation exists. But, when such threats inhibit the reasonable

performance of the school officials' responsibilities, grave damage to the instructional program ensues.

The dynamics of our democratic way of life prompt me to emphasize, in conclusion, that the "new tactics" we have examined are not "right" or "wrong," "moral" or "immoral," "professional" or "unprofessional," "bad" or "good;" rather, they are realities of life which public school people must deal with under a tripartite form of state and federal government during our times of expanding civil and human rights. We must understand the "new tactics" to ensure our best and most effective participation in the continuing process of reshaping our vibrant democracy to meet successfully the changing conditions of our days. There really is no viable alternative.

TAS:ja

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